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Supreme Court, U.S.
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In The

Supreme Court of the United States

October Term, 1997

NSBD, d/b/a FAIRLANE TOWN CENTER,

Petitioner,

v.

NATIONAL LABOR RELATIONS BOARD

Respondent.

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Sixth Circuit

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED

Did the Court of Appeals for the Sixth Circuit err by enforcing an Order of the National Labor Relations Board adopting the Administrative Law Judge's decision by:

I. Accepting the characterization of the resignation of the Charging Party as a discharge?

II. Finding an unfair labor practice in the denial of the Charging Party's demand for a part-time schedule since at the time the decision was made, no evidence of anti-union animus existed and neither the Administrative Law Judge or the National Labor Relations Board made a finding of anti-union animus?

LIST OF PARTIES

1. The National Labor Relations Board; and
2. NSBD d/b/a Fairlane Town Center.

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LOWER COURT AND AGENCY OPINIONS

The Order of the Sixth Circuit Court of Appeals in the *National Labor Relations Board v. NSBD, d/b/a Fairlane Town Center*, No. 97-5179, dated April 16, 1998 is an unreported decision and is reproduced as Appendix A.

The Decision and Order of the National Labor Relations Board captioned *NSBD d/b/a Fairlane Town Center and Scott A. Nalepa* is recorded at 321 N.L.R.B. No. 22 (April 30, 1996) and is reproduced as Appendix B.

The Administrative Law Judge Decision captioned *NSBD d/b/a Fairlane Town Center and Scott A. Nalepa*, No. 7-CA-36687, dated January 23, 1996 is reproduced as Appendix C.

The Order of the Sixth Circuit Court of Appeals in the *National Labor Relations Board v. NSBD, d/b/a Fairlane Town Center*, No. 97-5179, dated June 9, 1998, denying NSBD, d/b/a Fairlane Town Center's Petition for a Rehearing is reproduced as Appendix D.

JURISDICTIONAL STATEMENT

Petitioner seeks review of the April 16, 1998 Order of United States Court of Appeals for the Sixth Circuit, *rehearing denied* June 9, 1998, enforcing an Order of the National Labor Relations Board, reported at 321 N.L.R.B. No. 22. The Court of Appeals has decided an important issue of Federal Law by improperly sustaining the

Board's finding of an unfair labor practice without a finding of anti-union animus as required by § 8(a)(3) of the National Labor Relations Act. Therefore, this decision conflicts with Federal Labor Law as expressed in the National Labor Relations Act through decisions of the National Labor Relations Board, as well as decisions of the Sixth Circuit and other circuits. The conflict has not been, but should be reviewed and settled by this Court. Jurisdiction is conferred upon this Court pursuant to 28 U.S.C. Section 1254(1).

STATUTE INVOLVED

The present case involves interpretation of the National Labor Relations Act, 29 U.S.C. Section 158 (Section 8(a)(3) of the Act) which provides in relevant part:

> It shall be an unfair labor practice for any employer by discrimination in regard to hire or tenure of employment or any term or condition of employment to encourage or discourage membership in any labor organization.

STATEMENT OF THE CASE

Procedural Background

On December 20, 1994, Scott A. Nalepa ("Charging Party") filed a Charge with Region 7 of the National Labor Relations Board alleging that Petitioner violated Sections 8(a)(1) and (3) of the National Labor Relations Act ("Act") as follows:

"On or about June 28, 1994, the above-named Employer discharged security police office (sic), Scott A. Nalepa because of his activities on behalf of Police Officers Association of Michigan."

On February 2, 1995, Stephen M. Glasser, Acting Regional Director for Region 7, issued a Complaint and Notice of Hearing in this matter. A Hearing was held before Administrative Law Judge Arline Pacht on June 1 and 2, 1995. On January 23, 1996, ALJ Pacht issued her decision finding that Fairlane Town Center violated Sections 8(a)(1) and (3) of the Act by refusing to schedule the Charging Party to work part-time after he had accepted full-time employment with another employer and treating his refusal to continue working full-time as a voluntary quit (ALJ at App. 12).[1]

On March 4, 1996, Fairlane filed Exceptions to the Administrative Law Judge's decision. On April 30, 1996, the Board issued a Decision and Order affirming the Judge's rulings, findings, and conclusions and adopting her recommended order (BD at App. 32). The Board's Decision and Order adopting the ALJ's decision and findings *pro forma* is reported at 321 NLRB No. 22 (1996). On February 13, 1997, the Board filed its Application for Enforcement of its Order with the United States Court of Appeals for the Sixth Circuit. On April 16, 1998, after oral

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[1] References to the Decision of the Administrative Law Judge are designated (ALJ). References to the Board Decision and Order are designated as (BD). References to the Order of the Court of Appeals for the Sixth Circuit are designated as (CA). All page cites refer to the Appendix included herein.

arguments were heard, the Sixth Circuit issued its decision enforcing the Board's Order. On May 29, 1998, Fairlane filed its Petition for Rehearing with the Sixth Circuit. On June 9, 1998, the Sixth Circuit denied Fairlane's Petition for Rehearing.

Background

Fairlane Town Center ("Petitioner or Fairlane") is a large shopping center located in Dearborn, Michigan, covering approximately 1.5 million square feet in area and consisting of over 200 stores, including five major department stores. Fairlane is managed by The Taubman Company ("Taubman"), whose main offices are located in Bloomfield Hills, Michigan. At the time of the events involved in this proceeding, Fairlane employed about 36 to 38 security employees.

Robert R. Cleary, Esq. ("Cleary") served as General Counsel for Employment Relations for the Taubman Company from 1982-1988, then represented Taubman in the private practice of law through 1993, until he returned to Taubman in the position of Vice President and General Counsel of Employment Relations for Taubman, effective January 1, 1994. From October 1991 through August 31, 1994, Michael Fenley ("Fenley") was Fairlane's General Manager. Fenley was replaced as Fairlane's General Manager by Miles McPhee on September 1, 1994.

Harold Scott ("Scott") has been the Security Director at Fairlane since November 26, 1993 after three years service in the United States Army Military Police and 24 years of distinguished service with the Detroit Police

Department. While with the Detroit Police Department, Scott was a member first of the Detroit Police Officers Association, and then of the Union of the Lieutenants and Sergeants, before becoming the Commanding Officer of the Internal Affairs Division. Scott was an active member of each of these Unions and held offices in the Detroit Police Officers Association and the Union of the Lieutenants and Sergeants. Fairlane's previous Security Director was Charles Judson, although Fairlane's Operations Manager, A.J. Jemison, acted as Interim Security Director for a few months between the time that Judson departed and Scott was hired.

The Employment of Scott Nalepa, the Charging Party

Scott Nalepa, the Charging Party, was hired by Fairlane in 1989 as a part-time security officer. In approximately July, 1991, the Charging Party became a full-time security officer at Fairlane. In May, 1992, the Charging Party was elevated by Fairlane to the position of security police officer. On June 20, 1994, the Charging Party advised Security Director Scott that he had accepted a full-time position with the Michigan Department of Health as a security guard.

Harold Scott's Changes in Fairlane's Use of Part-Time Employees

Immediately upon being hired by Fairlane on Thanksgiving weekend of 1993, Scott met with Fenley and was told of scheduling and commitment problems in the Department. Thus, one of Scott's initial assignments in late 1993, well before the Election Petition was filed in

May, 1994, was to review the scheduling problems and come up with "workable and equitable" solutions. Thus, the ALJ's assertion that Fairlane invoked a new policy and applied it to the Charging Party soon after an Election Petition was filed is in direct conflict with the record evidence (ALJ at App. 24). The ALJ may have reached this erroneous conclusion due to her mistaken belief that Scott was hired in 1994 instead of 1993 (ALJ at App. 13).

Scott reviewed the matter and analyzed his predecessor's prior practice of allowing full-time Security Officers to convert to part-time status with Fairlane after taking full-time positions elsewhere. After his review, Scott decided that allowing employees with full-time jobs to maintain part-time positions at Fairlane contributed to the lack of commitment to Fairlane that he was trying to instill in his Security Department. Although he did not terminate any current officers who had been allowed, by his predecessor, to take part-time positions with Fairlane even though they held full-time jobs with other employers, he decided not to continue that practice. Scott began to implement this policy by refusing to hire three very qualified individuals holding full-time positions elsewhere, because they were seeking only part-time employment at Fairlane, with no desire to obtain a full-time position as one of Fairlane's Security Officers. Since becoming the Security Director, Scott has not allowed any employee who held a full-time position with Fairlane to take a "better" full-time job with another employer and work a part-time schedule at Fairlane.

The Rejection of Other Applicants for Part-Time Positions

The three applicants who were rejected by Scott because they had full-time positions elsewhere illustrate his concerns regarding commitment. One such applicant, Curtis Dennis, was a Dearborn police officer trained in the U.S. Army, and was extremely qualified. Nevertheless, upon reviewing his application, Scott determined that he would not hire Dennis because of the commitment and scheduling issues as well as the potential conflict that could arise with his full-time employment. Scott also testified that an applicant named Fred Jones had considerable experience that would have been beneficial to Fairlane. However, Jones was employed as a guard by the State of Michigan Corrections Department at the Ryan Correctional Facility in Detroit, so Scott did not hire him either. The ***full-time job accepted by the Charging Party*** was also as a guard with the State of Michigan's Department of Health. Finally, Scott testified that Jacqueline Green was a very good candidate with considerable experience in security work. Green was employed as a Security Lieutenant with a contract security company, and was looking for part-time employment at Fairlane, but Scott declined to hire her, solely because of her full-time employment elsewhere. Scott knew that Dennis, Jones and Green had no desire to become full-time Security Officers at Fairlane. Accordingly, he was not interested in hiring them as part-time employees at Fairlane simply so they could supplement their income.

Organizational Activities At Fairlane

On May 14, 1994, the Fairlane Security Officers Association, through representative Robert C. Wines, a Business Agent with the Police Officers Association of Michigan, filed a Petition for Election with the Michigan Employment Relations Commission ("MERC") seeking an Election among Fairlane's dispatchers, security officers and security police officers. Fairlane never challenged the Petition and on August 26, 1994, Fairlane voluntarily entered into an Agreement for Consent Election. The MERC Election was held on October 7, 1994, from 7:30 to 8:30 a.m. and from 3:30 to 4:30 p.m. The results of the Election were 14 votes against and 13 votes for union representation. No objections to the Election or to the employer's conduct during the Election were filed so the Election result was certified. No unfair labor practices other than the charge filed over Fairlane's refusal to grant the Charging Party's demand for a part-time schedule were filed either during the organizing drive or after the Election.

The ALJ's attempt to paint the Charging Party as the only significant Union supporter among Fairlane's security staff is clearly unwarranted. The Counsel for the General Counsel admitted during the Hearing that the Charging Party named other Union supporters in the affidavit that he gave to the NLRB agent investigating his charge, but the ALJ would not allow the names of the other Union supporters to remain in the Charging Party's affidavit for purposes of cross-examination. In fact, the Charging Party did not even vote or attempt to vote in the Election, despite the fact that the Charging Party was

physically present at Fairlane on that date and no representative of Fairlane ever told the Charging Party that he could not vote or would not be allowed to vote.

The ALJ places inappropriate significance on the testimony of Sergeant Vallely to conclude that the Charging Party was the Union's "sole protagonist." (ALJ at App. 23). According to the ALJ, Vallely testified that it was common knowledge "who was most involved in the Union drive." In fact, Vallely testified only that it was ***his impression*** "that it was common knowledge who the ***officers*** and primary ***parties*** involved. . . . " Clearly, Vallely was aware that other officers in addition to the Charging Party were also involved in the organizing activity which directly contradicts the ALJ's finding (ALJ at App. 17). This is not surprising, since the Tally of Ballots for the Election was ***almost dead even at 14 to 13***.

Further, the ALJ totally ignores Vallely's further testimony that, "We didn't draw judgment one way or the other," or that of Lieutenant Favazza, who upon being advised by his friend Nalepa that he was thinking of organizing a union, said only "do what you have to do," (ALJ at App. 15). In other words, the supervisors at Fairlane who were aware of the organizing activity did not care. Nevertheless, the fact that this information was not reported to management or discovered through investigation by the Security Director or higher managerial officials of Fairlane was twisted by the ALJ into an incredible claim that executives who never even testified at the Hearing and do not even work at Fairlane should have known about the conduct (ALJ at App. 23-24). Furthermore, there were no disciplinary actions against the

Charging party or any other union adherent taken by Fairlane.

Worse, the ALJ used the testimony of Vallely to defame the training and ability of Fairlane's Security Director, Harold Scott, by questioning "how incisive he was in performing his other investigatory duties." (ALJ at App. 23-24). The flaw in the ALJ's analysis and her unwarranted attacks on the Company's officials is due to her biased belief that Fairlane certainly would have used its trained personnel to "uncover the identity of persons responsible for various misdeeds at the shopping center" in which category the ALJ obviously would include union activity, despite the fact that the supervisors at Fairlane really didn't care about the activity "one way or another" and that Security Director Scott had been an active member of a Police Officer's Union for his entire career in the Detroit Police Department (ALJ at App. 23-24).

Since Fairlane's supervisors were not particularly concerned about the Union campaign, it is not surprising that some supervisors, such as Assistant Security Director, Dave Tucker, believed that certain employees were "pro-union," but did not pay attention to specific activity that they may have engaged in on behalf of the Union (ALJ at App. 17). The ALJ's determination that it was "impossible" to believe that supervisors could not know of an employee's union sentiments without also having been aware of specific activity taken on behalf of the Union is based on the ALJ's improper assumption, without foundation in the record, that Fairlane would have all of its supervisors engage in surveillance of the union activity of its employees, despite the legal prohibition against doing just that and their obvious lack of concern

over the union organizing effort (ALJ at App. 16). Such an assumption is unwarranted, particularly since there was no credited evidence of anti-union animus, as discussed more fully below, by any of Fairlane's supervisors. Furthermore, such an assumption presumes that Fairlane's supervisors would engage in unlawful conduct concerning union activities, without any support in the record.

The fact that the supervisors at Fairlane were not that concerned about the Union activity is further reflected in the testimony of the Charging Party regarding the reactions of Security Lieutenant Favazza. The Charging Party testified that in early April, 1994, he told Favazza, that he was "thinking about organizing a union." Favazza, who was the Charging Party's friend, simply told the Charging Party to "do what you have to do" and dropped the subject. Nothing happened to the Charging Party, and the Charging Party did not take Favazza's response to mean that Favazza was going to oppose the organizing effort. In fact, Favazza did nothing to oppose the organizing effort and never reported this conversation to Security Director Scott, probably because he knew that Scott would not care if the security officers became unionized.

The ALJ's reliance on the going away party held for Linda MacIntosh is also misplaced. During that party, the Charging Party allegedly gave MacIntosh a card that he claimed to have signed, "The Fairlane Security Officers Association", an organization the Charging Party made up. According to the Charging Party, when MacIntosh read the card, she indicated that it had been given to her by the Charging Party. Although, the Charging Party testified that some supervisors were present at certain

points during the party, he failed to identify specific supervisors present at the time the card was presented and there is no evidence that any comments were made during that party concerning the Charging Party's alleged involvement in or activities on behalf of the Fairlane Security Officers Association (ALJ at App. 15-18). ***Significantly, Harold Scott was not even in attendance at the party*** and there was no evidence that anyone even knew who the Fairlane Security Officers Association was, since the organization never existed before that year. Finally, there was no evidence that any management officials or supervisors actually read the card, or even were present at the time that MacIntosh read it. Either the supervisors in attendance at the party did not hear MacIntosh read the card or, more likely, they simply did not care. In either event, the ALJ's claim that the Charging Party "again drew attention to his involvement in union activities during a June farewell party for . . . MacIntosh" is misplaced (ALJ at App. 16).

The Resignation of the Charging Party

In the period that the Charging Party claimed to be the chief union organizer, from a few months before the May 14, 1994 filing of the Election Petition, to his June 20, 1994 meeting with Scott, there was no disciplinary action, wage or benefit reduction, or any other negative action taken against the Charging Party or any other union adherent by Fairlane. Furthermore, there is no evidence that the Charging Party's job was in jeopardy or that he needed to find alternative employment. The Charging Party sought new employment on his own accord and for

his own personal reasons, not because of any conduct on the part of Fairlane.

On June 20, 1994, the Charging Party went to Scott's office and advised Scott that ***he had obtained*** full-time employment as a guard with the State of Michigan Department of Mental Health, a job that he considered to be better than that of a full-time Security Officer at Fairlane, and demanded to be assigned a part-time schedule. The full-time job accepted by the Charging Party was similar to the full-time job held by Fred Jones, who Scott had rejected for part-time employment with Fairlane. Scott denied the Charging Party's demand, explaining that he was looking for more of a commitment from Fairlane's Security Officers, and that allowing full-time Officers to work a part-time schedule after taking higher paying "better" full-time jobs elsewhere would have the opposite effect. Scott told the Charging Party that it was nothing personal and that he would be interested in retaining him as a full-time Security Officer, but the Charging Party responded that he had already taken the job with the State of Michigan, so had no interest in working full-time for Fairlane. The decision was made by Scott, and Scott alone without any involvement by Lieutenant Favazza, Sergeant Vallely or Assistant Security Director Tucker.

The Review of Scott's Decision

The Charging Party was dissatisfied with this decision and asked Scott to review it with his direct supervisor, General Manager Michael Fenley, which Scott agreed to do, even though he had no obligation to do so.

Scott discussed the situation with Fenley who agreed with him and they decided to call Robert Cleary, Taubman's Vice President of Employment Relations. Cleary, who did not even know the Charging Party at the time, and whose office is located thirty miles from Fairlane, also agreed that allowing full-time employees to become part-time after taking full-time "better" jobs elsewhere, was inconsistent with their goal of developing a top notch Security Department committed to Fairlane, so advised Scott that he concurred with his decision. After this discussion, Scott determined that the Charging Party was not to be placed on the schedule beyond the last day that the Charging Party was willing to remain on full-time status, and scheduled a meeting with Fenley and the Charging Party to advise him that he had reviewed his initial decision with his supervisor and they had decided to concur in Scott's denial of Nalepa's demand for a part-time schedule.

The Charging Party's Contacts with Cleary

In late August or early September, over two months after the Charging Party had left Fairlane and had begun working full-time for the State of Michigan, Cleary learned that Nalepa was complaining he had been terminated involuntarily. Thinking that Nalepa wanted to return to Fairlane, Cleary called the Charging Party and offered immediate, unconditional reinstatement as a full-time employee. By letter to the Charging Party dated September 29, 1994, Cleary confirmed that there was an unconditional offer to him to return to his former position as a full-time Security Police Officer at Fairlane.

The Charging Party met personally with Cleary on October 7, 1994 at Fairlane. Again, Cleary attempted to persuade the Charging Party to return to work at Fairlane on a full-time basis. However, the Charging Party refused, explaining he was "sick of all the bullshit, the lack of manpower, poor supervision, and futility of running the department the way he (Fenley) sees fit." The Charging Party admits to telling Cleary that he was not interested in returning to work on a full-time basis for Fairlane because "they haven't shown any changes in – up to that point." The Charging Party admitted that he was willing to come back on a part-time basis at Fairlane, ***only to supplement his income***, and that he would return on a full-time basis only if changes were made in the way Fairlane operated.

REASONS FOR GRANTING THE WRIT

By enforcing the National Labor Relation Board's Order adopting the Administrative Law Judge's decision *pro forma*, the United States Court of Appeals for the Sixth Circuit has sanctioned an extreme departure from the accepted precedent by finding an unfair labor practice ***without a finding of anti-union animus***, as required by § 8(a)(3) of the National Labor Relations Act. This decision conflicts with decisions of the Sixth Circuit and other circuits as well as decisions of the National Labor Relations Board, and has not been reviewed, but should be reviewed and corrected by this Court.

ARGUMENT

The Court of Appeals for the Sixth Circuit erred by enforcing an Order of the National Labor Relations Board adopting the Administrative Law Judge's decision by erroneously construing the resignation of the Charging Party as a discharge; and by improperly sustaining the Board's finding of an unfair labor practice without a finding of anti-union animus as required by § 8(a)(3) of the National Labor Relations Act.

I. The Court of Appeals for the Sixth Circuit erred by enforcing an Order of the National Labor Relations Board adopting the Administrative Law Judge's decision by construing the Resignation of the Charging Party as a discharge.

This is not a discharge case. This is not a case where the employer initiated ***any*** action against the Charging Party. In this case, if the Charging Party had not sought and accepted another full-time job with another employer, he could still be working full-time for Fairlane. Fairlane did not terminate the Charging Party, but rather simply denied his demand to convert to part-time employment after he obtained full-time employment with another employer.

Thus, the ALJ, the Board, and the Sixth Circuit incorrectly found that the Company unlawfully terminated employee Scott Nalepa for his union activity. The Charging Party was not terminated. He resigned his full-time employment to take another job for more money and better benefits – a job he perceived to be better than the one he had with Fairlane. The Charging Party had

sought, obtained, and committed to take a full-time job with the State of Michigan *before* he went to Scott to ask for a part-time schedule.

Petitioner has consistently maintained that the ALJ's determination that it discharged the Charging Party was a serious error. This legal conclusion is erroneous because of its focus on this case as involving a termination of the Charging Party in response to organizing activity, rather than Fairlane's response to the Charging Party's demand for a change in employment status based on his voluntary acceptance of full-time employment elsewhere.

The "timing" of Fairlane's refusal to allow the Charging Party to continue working part-time after accepting full-time work elsewhere was completely controlled by the Charging Party. This further supports our position that this is not a discharge case. It was the Charging Party who chose to obtain full-time employment with the State of Michigan, even though he claims to have been actively involved in organizing activity at Fairlane at that time. Thus, Fairlane did not abruptly decide to terminate the Charging Party's employment. Rather, Fairlane was forced to respond to the Charging Party's demand to convert to part-time status.

Scott had determined that employees who had other full-time employment should not be allowed to work at Fairlane on a part-time basis, and Scott had rejected at least three job applicants because of his beliefs in this regard. However, this was the first time that a current full-time employee of Fairlane had obtained full-time employment elsewhere and asked Scott to be allowed to convert to part-time status. While the Board somehow

attempts to blame Fairlane for the fact that the Charging Party sought and obtained full-time employment with the State of Michigan at the same time that he claims to have been involved in organizing activities at Fairlane, the fact remains that the timing was solely within the control of the Charging Party, not Fairlane.

Significantly, neither Scott nor any other Fairlane representative took any action against the Charging Party in the three months that he claimed to be organizing the Union. The only action alleged to be unlawful was Scott's denial of the Charging Party's demand for a part-time schedule. In response to that denial, the Charging Party was free to stay or to leave. He chose to leave even though Scott, Fenley and Cleary over the next five months tried to convince him to stay or to return. The initial decision, denying part-time status to the Charging Party, was Scott's, and Scott's alone. That decision's timing was not dictated by Scott, nor did Scott desire to or intend to terminate the Charging Party. Scott simply wanted him to work full-time. The Charging Party decided to leave Fairlane because he found an opportunity that he perceived to be a better one. Fairlane cannot be obligated to accommodate every employee's personal desires without regard to its concerns.

II. The Court of Appeals for the Sixth Circuit erred by enforcing an Order of the National Labor Relations Board adopting the Administrative Law Judge's decision by finding an unfair labor practice in the denial of the Charging Party's demand for a part-time schedule without finding anti-union animus since no evidence of anti-union animus existed and neither the Administrative Law Judge or the National Labor Relations Board made a finding of anti-union animus.

There was no Direct Evidence of Anti-union Animus Found by the ALJ or the Board

In order to find an 8(a)(3) violation, anti-union animus is required. *W.F. Bolin Co. v. NLRB*, 70 F.3d 863 (6th Cir. 1995); *NLRB v. E.I. DuPont de Nemours*, 750 F.2d 524 (6th Cir. 1984); *NLRB v. Supreme Bumpers, Inc.*, 648 F.2d 1076 (6th Cir. 1981). Numerous decisions of the Board, and the Sixth Circuit, as well as other Circuits have held that ***knowledge of union activities does not necessarily constitute anti-union animus.*** *NLRB v. E.I. DuPont de Nemours, supra; NLRB v. Supreme Bumpers, Inc., supra; Simmons Industries*, 321 N.L.R.B. No. 32, 152 L.R.R.M. 1155 (BNA) (1996); *Torrington v. NLRB*, 17 F.3d 580 (2nd Cir. 1994); *Mini-Togs v. NLRB*, 6 F.3d 1110 (5th Cir. 1993); *Meco v. NLRB*, 990 F.2d 1367 (DC Cir. 1993).

Even though we disagree with the Sixth Circuit enforcing the Board's finding that knowledge of the Charging Party's union activities was so widespread, it certainly was not a major issue to any of his supervisors or to Scott, the Security Director. If it was so significant to Fairlane's supervision, how can the Board explain away the fact that absolutely nothing happened to the Charging Party in the three or four month period that he claimed to

be organizing a union? There is no evidence of hostility by any Fairlane supervisor toward either the Charging Party's union activities or unionization in general. Further, the evidence clearly indicates that Fairlane's supervisors did not even care about the Charging Party's activities on behalf of the Union. In fact, ***not a single objection or unfair labor practice*** was filed against Fairlane throughout the entire organizing drive.

The Charging Party admitted that when he told Lieutenant Favazza that he was thinking about organizing a union, there was no expression of anti-union animus. Favazza simply told the Charging Party to "do what you have to do." Similarly, Sergeant Patrick Vallely testified that the supervisors at Fairlane expressed no animus toward the Charging Party because of his union activities. In response to questions by Counsel for the General Counsel, Vallely testified that it was his impression that it was common knowledge who the officers or primary parties involved were and "we didn't draw judgment one way or the other." Thus, the evidence put into the record by Counsel for the General Counsel through ***its own witnesses*** directly contradicts findings made by the ALJ, adopted by the Board and the Sixth Circuit that anti-union animus existed. Again, knowledge of union activities cannot alone constitute anti-union animus, which is a necessary element of an 8(a)(3) violation. *See supra E.I. DuPont de Nemours; Supreme Bumpers, Inc.; Simmons Industries; Torrington v. NLRB; Mini-Togs v. NLRB; Meco v. NLRB.*

In addition to a lack of any direct evidence of anti-union animus on the part of any supervisors, there is absolutely no direct or circumstantial evidence of anti-

union animus on the part of Scott, the Fairlane representative who made the decision to deny the Charging Party's demand to be placed on a part-time schedule. At no point during the NLRB investigation, the ALJ Hearing, or the Board's enforcement of the ALJ's decision was there any mention of any evidence alleging that Scott had any anti-union animus. In fact, Scott has a history of union membership, activity and support throughout his entire career.

This cannot be a case where the Board can rely on circumstantial evidence to make a finding of anti-union animus. There are no other unfair labor practices found or even alleged, other than the one comment made by the Charging Party that the ALJ discredited by saying that the Charging Party "concocted this story and related it to the General Counsel's benefit shortly before the instant trial in order to enhance his case." (ALJ at App. 18). Yet the Sixth Circuit made a finding of animus based on the ***knowledge*** of the Charging Party's union activity and a statement made by Cleary some four months after Scott's decision not to grant the Charging party's demand for a part-time schedule. (CA at App. 6). This evidence was not taken into consideration by the ALJ or by the National Labor Relations Board. Since deference to the Board's factual findings [adopting the ALJ decision] is appropriate where the record is fraught with conflicting testimony and essential credibility determinations have been made, *Tony Scott Trucking v. NLRB*, 821 F.2d 312 (6th Cir. 1987), the Sixth Circuit should not have considered this evidence in determining whether anti-union animus existed.

Other prior cases finding 8(a)(3) violations based on circumstantial evidence rely on other unfair labor practices, other unlawful conduct, disparate treatment, and/or the employer's timing of its action, *NLRB v. Supreme Bumpers, Inc., supra; W.F. Bolin Co. v. NLRB, supra.* None of those elements of circumstantial evidence were found here. The only circumstantial evidence in this case cited by the Board or its ALJ is its presumption of widespread knowledge of the Charging Party's union activities due to actual knowledge by ***some*** supervisors. Mere knowledge is not sufficient without anti-union animus for an unfair labor practice finding, *Simmons Industries, supra; Meco v. NLRB, supra.*

Despite the fact that Fairlane did not concern itself with the Charging Party's union activities, the Board concludes that because some supervisors of Fairlane, who had no part in Scott's decision to deny the Charging Party's demand to be placed on the part-time schedule, had knowledge of the Charging Party's activities, retaliation must be inferred. This erroneous conclusion fails to recognize the difference between "knowledge" of union activity and anti-union animus. In fact, the ALJ was so astounded that high-level officers of a Company would not engage in unlawful surveillance of the union activities of its employees that she noted: "Surely, Scott's [Fairlane's Chief of Security] professional training equipped him with the investigatory skills needed to pinpoint responsibility for undesirable conduct." (ALJ at App. 16).

The ALJ's biased views with respect to employer responses to organizing activity went beyond even the bounds found permissible by the Board when she

defamed Security Director Scott because of his denial of knowledge of the Charging Party's union activities. The ALJ stated: "Scott, the chief of the security force, was professionally trained to uncover the identity of persons responsible for various misdeeds at the shopping center. If he was oblivious to the presence of a union proponent on his staff, one wonders how incisive he was in performing his other investigatory duties." (ALJ at App. 23-24).

ALJ Pacht's assumption that Security Director Scott considered union activity to be "undesirable conduct" or a "misdeed" fails to recognize the reality that Scott had spent most of his working life as an active member of the Detroit Police Officers Association and had no anti-union feelings at all. It also fails to recognize the reality that a large shopping center like Fairlane located in a suburb of Detroit wants to attract all types of customers from the Metropolitan Detroit area, including union members. Therefore, showing hostility to union membership, especially in the Detroit area, would be akin to economic suicide for any retail operation. It would make no sense for Fairlane to annoy a significant element of its potential customer base. The Board argues that Scott's active union involvement throughout his life is irrelevant because the "shift in Scott's economic self-interest would lead quite naturally to a corresponding shift in his alliances." What the Board argues, in essence, is that simply because Scott became a member of management, anti-union sentiment may be attributable to him. However, there is no evidence in this case, or any case law to support such an argument. Rather, the evidence indicates that Scott was not opposed to unions, so that even if Scott did have knowledge of

union activity, he did not have anti-union animus which is a required element of an unfair labor practice finding.

Cleary's October Comment Cannot Be Anti-union Animus for Scott

The only evidence of anti-union animus even mentioned by the ALJ, the Board, or the Sixth Circuit relates to an October 1994 comment by Cleary mentioned for the first time in the Sixth Circuit's decision. The October comment by Cleary, ***made four months after a June decision by Scott***, cannot constitute anti-union animus motivating that June decision. In fact, the Board has held that an employer does not violate section 8(a)(3) even though its Vice President harbored anti-union animus where the manager responsible for the employment decision did not. *C&S Distributors, Ins.*, 321 NLRB No. 52, 152 L.R.R.M. 1168 (BNA) (1996). Furthermore, the Seventh Circuit has held that an offhand comment is not enough to constitute an unfair labor practice. *NLRB v. Champion Laboratories*, 99 F.3d 223, 153 LRRM 2657 (7th Cir. 1996). Additionally, Cleary was not even aware of Scott's decision not to allow the Charging Party to work a part-time schedule until the Charging Party requested that Scott have his decision reviewed. Therefore, Cleary had no input in Scott's decision. Finally, Cleary's comment was made ***two weeks after*** Cleary offered to rehire the Charging Party as a full-time employee, an offer Cleary also confirmed in writing.

Even the ALJ recognized that, at the critical time in this case, when Cleary was contacted about Scott's decision to deny part-time employment in June, Cleary did

not even know the Charging Party and did not know who was involved in the union organizing drive. The ALJ and the Board did not consider any of Cleary's comments or actions to be anti-union animus. Therefore, the Sixth Circuit erred in its decision enforcing the Board's Order by making a new finding of anti-union animus simply to support the Board's decision which was bereft of the first requirement for finding an unfair labor practice.

The Sixth Circuit should have considered the totality of Fairlane's conduct regarding the Election, instead of resting on one stray comment uttered four months after a decision was made by an individual other than the decision maker. As we have previously stated, ***no objections or unfair labor practice*** charges were filed over anything other than Harold Scott's refusal to grant Nalepa's demand for part-time employment. Fairlane offered to rehire the Charging Party in September, a few weeks before the Election. An employer "preoccupied" with keeping a union proponent from voting in an election would not have offered immediate reinstatement to that employee prior to the Election. Neither Cleary nor any other Fairlane representative made any attempt to prevent the Charging Party from voting. If this were the employer's objective, Cleary would not have invited the Charging Party to Fairlane on that day in the first place.

In fact, the Charging Party also had no interest in the Union or the NLRB election by the date of the Election. Had the Charging Party desired, he certainly could have cast at least a challenged ballot in the Election. He never attempted to do so and the Union never sought to have him declared an eligible voter. Rather, the Charging Party made it clear that he had no interest in working for

Fairlane unless changes were made by Fairlane's management. By the Charging Party's own admission, his only interest in Fairlane, was in part-time employment so that he could supplement his income from his other, full-time employment. The Charging Party's acceptance of his new job from the State of Michigan was unconditional and without any regard for Fairlane. This is precisely the lack of commitment to Fairlane that Scott had determined was not in the Company's best interest. That was a legitimate management decision that was Scott's to make, not the ALJ's, the Board's or the Court's.

The Sixth Circuit accepted the Board's bootstrapping of its erroneous thought processes into a determination that because the Charging Party allegedly made himself a "target" by engaging in union activities, and because in the Board's view, employers should think of such activities as "undesirable," any subsequent actions taken by Fairlane involving the Charging Party *ipso facto* become unlawful. Case law does not support any such legal argument. Rather, there can be no finding of an unfair labor practice where evidence fails to establish that anti-union animus was a dominant motive or that illegal purpose was a motivating factor in the employer's decision. *NLRB v. Consolidated Freightways Corp.*, 651 F.2d 436 (6th Cir. 1981).

The Charging Party was not discharged. The Charging Party voluntarily sought and obtained another full-time job at higher wages and benefits and was found to have "concocted" part of his testimony in order to enhance his case. The Charging Party should not be rewarded by the Sixth Circuit's decision enforcing the Board's Decision and Order which failed to provide a

shred of evidence of anti-union animus on the part of the individual that decided to deny the Charging Party's demand for a part-time schedule. This Court, in following Federal Labor Law, should require substantial evidence of anti-union animus in order to find an unfair labor practice. Further, this Court should rule that "knowledge" of union activity, alone, is not enough to prove anti-union animus as required under § 8(a)(3) of the National Labor Relations Act.

PRAYER FOR RELIEF

Petitioner, NSBD d/b/a Fairlane Town Centers, respectfully requests that this Honorable Court grant its Petition for Writ of Certiorari.

Dated: September 8, 1998

Respectfully submitted,

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APPENDIX A

J-4993

NOT RECOMMENDED FOR PUBLICATION

No. 97-5179

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

NATIONAL LABOR RELATIONS BOARD,	)	
Petitioner,	)	ON APPLICATION FOR ENFORCEMENT FROM THE NATIONAL LABOR RELATIONS BOARD
v.	)	
NSBD, d/b/a FAIRLANE TOWN CENTER,	)	(Filed April 16, 1998)
Respondent.	)	

Before SUHRHEINRICH, DAUGHTREY, and COLE, Circuit Judges.

PER CURIAM. In its petition, the National Labor Relations Board seeks enforcement of its decision ordering NSBD, doing business as the Fairlane Town Center, to reinstate an employee allegedly discharged because of that individual's efforts to organize a union. The resolution of this dispute rests in large part upon witness credibility determinations made by the administrative law judge. Because of the deference that must be accorded to those findings, we conclude that the order of the Board affirming the decision of the administrative law judge should be enforced.

FACTUAL AND PROCEDURAL BACKGROUND

In 1989, Scott Nalepa, a private investigator, began supplementing his income by working part-time as a security guard at the Fairlane Town Center, a large indoor shopping mall in Dearborn, Michigan. By 1991, however, Nalepa had become a full-time security guard at the mall and had abandoned all other employment.

Eventually, Nalepa became troubled by certain practices and policies of the company and began soliciting votes during non-working times to organize the security guards into a formal union. According to fellow employees of Fairlane, it was clear that Nalepa was the leader of the unionization movement. Employees also maintained that it was common knowledge throughout the company who the primary parties of the organizational effort were. Furthermore, Nalepa did not attempt to conceal his pro-union sentiments. For example, at a going-away party for a fellow employee, Nalepa read aloud a greeting card signed by the "Fairlane Security Officers Association," the name given to the fledgling labor group.

As the time for the union representation election neared, the security guards and members of Fairlane management began discussing labor issues more frequently. Nalepa contended that in early June 1994, he was summoned by Dave Tucker, assistant security director, to a picnic table outside one of the doors to the mall. Upon arriving there, Nalepa said, he observed Tucker conversing with two other security guards. According to Nalepa, Tucker then spotted him and inquired, "Are you the one starting all this union shit?" Nalepa maintained that

when he jokingly denied his involvement, Tucker stated that if the union were to be elected as the bargaining representative of the guards, those employees would lose their jobs and contract security personnel would be hired.

On June 20, 1994, Nalepa informed Harold Scott, the security director at Fairlane since November 26, 1993, that he had been extended a full-time employment offer with the Michigan Department of Mental Health and that he would like to remain at Fairlane only in a part-time capacity. Scott and Michael Fenley, the general manager of the shopping center, denied the request and told Nalepa on June 28 that the company no longer allowed individuals with full-time employment elsewhere to serve in a part-time capacity at Fairlane. They then informed Nalepa that they would treat his request for part-time employment as a resignation from his full-time job and offered him a check already made out in an amount equal to the wages Nalepa was due for unused sick and annual leave. Nalepa refused the check, however, insisting that he had not resigned, but rather had requested only to be placed on part-time employment status.

Nalepa pursued his employment disagreement with Robert Cleary, the vice-president of employee relations for the company owning Fairlane. Cleary, however, agreed with Harold Scott's decision to deny Nalepa's request, and Nalepa ceased employment with Fairlane after July 3, 1994. He did return to the company offices in October 1994 to discuss the situation further with Cleary. Whether by coincidence or not, the day on which Nalepa returned was also the day set aside for the election to determine whether the Fairlane security employees

wished to be represented by a union. Upon seeing Nalepa, Cleary remarked, "Imagine that, Scott Nalepa showing up here on the day of the union vote."[1] Although Cleary did not change his position on the company's decision to deny requests for part-time employment by individuals holding full-time jobs elsewhere, he did offer Nalepa immediate reinstatement at Fairlane as a full-time officer.

Nalepa declined Cleary's offer and instead filed an unfair labor practice charge against the company, alleging that his termination resulted solely from management's disapproval of his role in the union organizing movement. The Board issued a complaint charging violations of §§ 8(a)(1) and (3) of the National Labor Relations Act, 29 U.S.C. §§ 158(a)(1) and (3), and the charge was referred to an administrative law judge for an evidentiary hearing. At the conclusion of the hearing, the administrative law judge found that Fairlane had indeed unfairly terminated Nalepa for his union activity and, therefore, ordered that the company reinstate him "to the part-time position for which he applied and would have been employed but for Respondent's unlawful discrimination against him." The Board affirmed the administrative law judge's decision and order with slight modifications not germane to this appeal. The Board filed an application with this court then seeking enforcement of that order.

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[1] The union lost the election by a vote of 14-13.

DISCUSSION

An employer commits an unfair labor practice by making an employment decision so as to discourage union membership or interfere with an employee's right to organize. *Opportunity Homes, Inc. v. NLRB*, 101 F.3d 1515, 1518 (6th Cir. 1996). The threshold test for determining whether the employment decision constitutes an unfair labor practice is whether that decision was motivated by anti-union animus. *NLRB v. Cook Family Foods, Ltd.*, 47 F.3d 809, 816 (6th Cir. 1995).

We have held that the Board bears the initial burden of showing, by a preponderance of the evidence, that the employees decision was motivated by the employee's exercise of rights protected by the National Labor Relations Act. *Id.* Only after such a *prima facie* showing has been made does the burden of persuasion shift to the employer to establish, also by a preponderance of the evidence, the affirmative defense that the same employment decision would have been made even in the absence of any protected labor activity. *W.F. Bolin Co. v. NLRB*, 70 F.3d 863, 870 (6th Cir. 1995). *See also Director, Office of Workers' Compensation Programs, Dep't of Labor v. Greenwich Collieries*, 512 U.S. 267, 278 (1994).

Board findings with respect to questions of law are then reviewed by this court *de novo*, while the Board's findings of fact are upheld if supported by substantial evidence on the record. 29 U.S.C. §§ 160(e), (f). "Substantial evidence" has been defined as "such relevant evidence as a reasonable mind might accept as adequate to support a conclusion." *Opportunity Homes, Inc.*, 101 F.3d at 1518 (quoting *Consolidated Edison Co. v. NLRB*, 305 U.S.

197, 229 (1938)). "Deference to the Board's factual findings is particularly appropriate where the 'record is fraught with conflicting testimony and essential credibility determinations have been made.' " *Tony Scott Trucking, Inc. v. NLRB*, 821 F.2d 312, 315 (6th Cir. 1987) (per curiam) (quoting *NLRB v. Nueva Eng'g. Inc.*, 761 F.2d 961, 965 (4th Cir. 1985)).

In attacking the Board's decision in this matter, Fairlane first insists that the Board failed to establish that the company acted with anti-union animus in refusing Nalepa's request for part-time employment. In so contending, Fairlaine argues that the only evidence in the record of anti-union animus – the claim that the assistant director of security accused Nalepa of instigating "this union shit" and also threatened a loss of jobs if the union prevailed in the representation election – was discredited by the administrative law judge as a "concocted" story by Nalepa to strengthen his claims.

In fact, however, other evidence of anti-union animus was present in the testimony offered at the administrative hearing in this matter. Although most management personnel steadfastly denied knowledge of Nalepa's union organizing activities, other credible testimony established that Nalepa often talked about his pro-union leanings and organizational duties in front of his supervisors and that it was "common knowledge" who the primary parties of the organizational effort were. Moreover, the administrative law judge and Board could reasonably infer animosity and knowledge of Nalepa's organizing role from Robert Cleary's admitted, sarcastic statement commenting on Nalepa's presence at the center on the day of the union election. This court may not displace

such reasonable inferences of the Board. *Pikeville United Methodist Hosp. v. United Steelworkers of America, AFL – CIO,* 109 F.3d 1146, 1154 (6th Cir.), *cert. denied,* 118 S.Ct. 557 (1997).

Additional evidence of anti-union animus may be inferred from other comments made by *Cleary* prior to the election to the effect that a union walk-out would result in the hiring of contract labor and the exclusion of union personnel. In those comments, presented as inevitable fact, Cleary made no mention of the possibility of negotiation with the union or of the fact that replacement of the workers might not be justified.

Furthermore, the evidence before the administrative law judge and the Board was uncontradicted that Fairlane had no written or oral policy forbidding the type of part-time employment Nalepa sought. Although management personnel attempted to explain that Harold Scott, upon assuming the position of security director in November 1993, had altered the previous policy on the subject, those witnesses also admitted that the alleged change in policy was never communicated to Nalepa or to any other employees.

The Board also introduced evidence that other part-time employees still maintained full-time jobs elsewhere, even after Scott's ascension to the position of security director. Only Nalepa, a known union organizer, was denied the opportunity to prove that he could handle the demands of the two employment positions. Management witnesses attempted to defuse the damaging effect of such evidence by explaining that Nalepa's request for part-time employment while otherwise employed full-

time was the first one presented to Scott as a prospective employment decision. Ordinarily, such a defense might serve to negate an inference of anti-union animus. In this matter, however, the evidence was clear that Fairlane was intent on removing Nalepa from its work force. On the date that Nalepa first went before representatives of management for formal discussion of his *request* for a change in status, he was not only rebuffed in his efforts, but also was handed a check already cut to reflect termination of his employment with the company. Until that meeting, however, Fairlane could not have known that, if presented with the option of remaining on full-time status with the company or resigning, Nalepa would choose to sever his relationship with the centers security force.

The combination of these evidentiary facts and reasonable inferences drawn from them establishes at least the necessary elements of a *prima facie* case of improper job action by Fairlane. The Board correctly placed upon the company, therefore, the burden of establishing the affirmative defense that the same employment decision would have been made regardless of Nalepa's union affiliations.

In its effort to fulfill that burden, Fairlane contends that the company's stated rationale for its decision was a legitimate business determination and that the administrative law judge cannot substitute her opinion of proper management for that of the company. Fairlane may indeed determine for itself that employment of part-time security guards exacerbates scheduling problems and increases the likelihood that overtime costs will be incurred when inflexible part-time employees are unable to work in the stead of permanent employees who have

already accumulated 40 hours of work in a given week. The problem with Fairlane's argument, however, is the simple fact that the company previously allowed the very type of dual employment sought by Nalepa. Even though Fairlane contends that its policy regarding such service changed with the hiring of Harold Scott as security director, the fact remains that the alleged policy was not communicated to any affected employees. Moreover, even after Scott took over as security director, other individuals were allowed to work part-time at Fairlane while holding down full-time jobs elsewhere.[2] The uncommunicated shift in policy to impact only the one individual spearheading the drive to unionize the company suggests

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[2] For example, Todd Seipenko testified that in December 1993, he worked part-time at Fairlane while employed elsewhere as a full-time police officer. Although Seipenko eventually resigned his part-time position at Fairlane because he felt he was not able to allot sufficient time to the company, the fact is undisputed that no one at Fairlane told him such dual employment was not allowed, was against company policy, or was considered a conflict of interest. Scott Kulinski also testified that he began working part-time at Fairlane on December 1, 1993 even though he continued to work full-time at another job. Kulinski further stated that no one at Fairlane commented about such split employment.

Other evidence was admitted before the administrative law judge that one on-call, part-time employee also continues to be employed elsewhere on a full-time basis and that some Fairlane full-time employees are employed elsewhere on a part-time schedule. Robert Cleary himself testified at the hearing that, since the denial of Scott Nalepa's request for part-time hours, at least seven part-time employees had been hired, several of whom were also employed elsewhere, although not as full-time workers.

not legitimate decision-making, but an effort to rid the business of labor organizers.

In a final effort to undermine the decision of the Board and the administrative law judge, Fairlane argues that the administrative law judge's credibility determinations are contrary to good sense and, therefore, are not supported by substantial evidence. The company insists that the administrative law judge's determinations should not be given credence first, because she found one part of Nalepa's testimony to be "concocted" yet other parts to be believable, and second, because one footnote of her written opinion erroneously referred to Robert Cleary as "Healy."

This court has previously held that the testimony of a particular witness need not be accepted or rejected in its entirety. *NLRB v. Downslope Indus., Inc.*, 676 F.2d 1114, 1116 (6th Cir. 1982). Instead, an administrative law judge is justified in crediting certain parts of a witness's testimony while discrediting other parts. *Carrier Corp. v. NLRB*, 768 F.2d 778, 782 (6th Cir. 1985).

Fairlane's attempt to discredit the administrative law judge's factual findings because of an obvious typographical error in a single reference to a witness in a footnote to her lengthy opinion is also disingenuous. Fairlane admits in its brief that no individual named "Healy" offered testimony at the administrative hearing in this matter or was otherwise involved in this dispute. Such a reference in the opinion of the administrative law judge must, therefore, be taken merely as an inadvertent error. Furthermore, that mistake did not alter the underlying facts

found or the conclusions reached by the administrative law judge.

CONCLUSION

The ultimate decision reached by the administrative law judge in this case rested in great part upon credibility determinations reached by her in evaluating the testimony of both self-interested and unbiased witnesses. Crediting testimony of Fairlane's witnesses would provide evidence to support a conclusion that Fairlane's decision not to hire Nalepa on a part-time basis was a legitimate decision not affected by the complaining party's organizing activities. Crediting the testimony of other witnesses, however, provides substantial evidence in support of the conclusion that the decision not to honor Nalepa's employment request was driven by the company's anti-union animus. In such a situation, this court must defer to the credibility determinations and factual findings of the decision-maker who had the opportunity to evaluate the witnesses in person. Because such deference leads to the conclusion that Fairlane arrived at its employment decision in order to deny Nalepa protections afforded by the National Labor Relations Act, we ORDER ENFORCEMENT of the decision of the Board.

APPENDIX B

JD-1-96
Dearborn, MI

UNITED STATES OF AMERICA
NATIONAL LABOR RELATIONS BOARD
DIVISION OF JUDGES

NSBD d/b/a FAIRLANE TOWN CENTER
Respondent

and **7-CA-36687**

SCOTT A. NALEPA,
An Individual

Gary Saltzgiver, Esq.
Counsel for the General Counsel[1]
Region 7

James B. Perry, Esq.
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Detroit, Michigan
Counsel for the Respondent

DECISION

I. Statement of the Case

Arline Pacht, Administrative Law Judge: Upon a charge filed in the above-captioned case on December 20, 1994 by Scott A. Nalepa, (hereinafter Nalepa) against NSBD d/b/a Fairlane Town Center (hereinafter, Fairlane or Respondent), a Complaint issued on February 16, 1995, alleging that Respondent violated Section 8(a)(1) and (3)

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[1] Hereinafter, the General Counsel.

of the National Labor Relations Act, as amended (the Act) by denying Nalepa's request to work part-time and terminating him because of his Union activity.[2] The Respondent filed a timely Answer denying the allegation.

This matter came to trial before me on June 1-2, 1995, in Detroit, Michigan, with all parties having an opportunity to examine and cross examine witnesses, introduce documentary evidence and argue orally.[3] Upon the evidence presented in this proceeding, my observation of the witnesses' demeanor, and consideration of the parties' post-trial briefs, I reach the following:

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[2] At the proceeding, the General Counsel moved to amend the Complaint to add the following alleged violations of Section 8(a)(1)

> 10(a) On or about 6/8/94, the Er [Employer], by its agent Dave Tucker, interrogated ees [employees] about their union activities.
>
> (b) On or about 6/8/94, the Er by its agent Dave Tucker, impliedly threatened ees with loss of jobs because of their union activities.

I denied the motion, on the grounds that a few days before the instant trial, the General Counsel advised counsel for the Respondent that he had no present intention of amending the Complaint. However, I pointed out that evidence bearing an the allegation could be introduced as proof of anti-union animus.

[3] Exhibits introduced into evidence by the General Counsel and the Reespondent [sic] will be cited as GCX and RX respectively, followed by the relevant document number. Language quoted from the transcript will be referred to as TR followed by the appropriate page number.

II. Findings of Fact

A. Jurisdiction

Respondent, a Michigan corporation with an office and place of business in Dearborn, Michigan, has been engaged in the management and operation of a shopping center. Accordingly, the Respondent alleges and I find that Fairlane is an employer within the meaning of Sec. 2(2), (5) and (6) of the Act.

The Union is a labor organization within the meaning of Sec. 2(5) of the Act.

B. Alleged Unfair Labor Practices

1. Introduction

The Fairlane Shopping Center, one of the largest enclosed malls in Michigan, employed a security force of approximately 24 to 28 officers, 7 of whom were part-time, and one who was on call, at the time of the events giving rise to this proceeding. Charging Party Scott Nalepa (herein, after, Nalepa) joined Respondent's security staff on a part-time basis, informing some of Respondent's staff that he also worked as a private investigator. In 1991, he became a full-time security guard while continuing to work as a private investigator. He remained in this status until June 28, 1994, when he either was discharged, as the General Counsel claims, or resigned, as the Respondent alleges.[4]

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[4] Unless otherwise noted, all events took place in 1994.

2. Nalepa Initiates a Union Organizing Drive

In late February or early March, Nalepa contacted Robert Wines, a business agent of the Police Officers Association of Michigan (POAM), to request guidance in organizing a union of security guards at Fairlane. Wines gave him authorization cards which Nalepa distributed to his fellow employees during his non-working time. By April, Nalepa had gathered enough signed cards to establish the requisite showing of interest. Thereafter, on May 16, a Petition For Election was filed with the Michigan Employment Relations Commission.

3. Evidence Bearing on Respondent's Knowledge

Nalepa testified that he attempted to keep a low profile while engaging in organizational activities. In fact, he was not as cautious as he thought, for occasionally, he spoke about his efforts on behalf of the union in a quite unguarded manner. For example, sometime in April, Nalepa told a supervisor, Lieutenant Tom Favazza, that he was considering organizing a nion [sic]. Favazza replied non-committally, that Nalepa "should do what you have to do." (TR 25)

In May, Nalepa told another supervisor, Sergeant Pat Vallely, that he had been dealing directly with the Union. Vallely confirmed that Nalepa had been less than restrained in discussing the Union, and had spoken openly about POAM in the presence of other supervisors. I found Vallely to be a trustworthy witness, whose candor

was remarkable considering that he was a supervisor and that Scott was responsible for his promotion to this post.

Nalepa again drew attention to his involvement in union activities during a June farewell party for Respondents departing Marketing Director, Linda Macintosh. At the party's conclusion, with guests gathered around her, including Operations Manager, Aj Jemison, Fenley and Facilities Manager Will Tamminga, Macintosh opened gifts and read greeting cards aloud. Among the cards was one containing the following inscription: "this card is from Scott Nalepa and all the security officers at Fairlane" signed, "The Fairlane Security Officers Association." (TR 27-28).

Contrary to Nalepa's assumption that he was discrete, his efforts were not unnoticed. In fact, former Sergeant Vallely asserted that the identity of the person who was most involved in the Union drive was a matter of "common knowledge." (TR. 208). Thus, denials by Security Director Harold Scott, General Manager Michael Fenley and Vice-President of Employee Relations, Robert Cleary, that they knew Nalepa was spearheading the union organizing campaign are surprising, in fact, incredible. Surely, Scott's professional training equipped him with the investigatory skills needed to pinpoint responsibility for undesirable conduct.

4. Evidence Bearing on Anti-union Animus

Nalepa testified that on or about June 8, Assistant Security Director, Dave Tucker, while seated at a picnic table outside the security guards' office with another

supervisor, Lieutenant Andrayko, asked whether he was the one starting all the "union shit; that if he was, Respondent would fire everyone and hire contract security. (Tr. 31) Nalepa stated that he told Tucker if that happened, the guards would file charges and regain their jobs with full back pay.

Brian Headen, a former security guard, corroborated Nalepa's account of this exchange asserting that he had appeared on the scene in time to hear Tucker question Nalepa and warn him that if the union prevailed, the security guards would lose their jobs and be replaced. Headen added that Nalepa also said something about his role in bringing the union in to represent the guards. Respondent attacked Headen's credibility by establishing that he had been terminated for misconduct and was friend with the Charging Party.

Tucker admitted that he occasionally sat at a picnic table outside the facility with Lieutenant Andrayko. He further acknowledged knowing that Nalepa was pro-union, but did not know the nature of the activities in which Nalepa was engaged. Moreover, he denied making the hostile statement both Nalepa and Headen attributed to him.

Nalepa's and Headen's testimony regarding this matter leaves much to be desired. Most damaging is the omission of any reference to Tucker's alleged remark in the affidavit which Nalepa gave to a Board agent in early January, 1996. Apparently, Nalepa did not bring this incident to the General Counsel's attention until shortly before the instant hearing. In attempting to explain this oversight, Nalepa stated that he did mention this

exchange to the Board agent who waved it off as if he thought the incident was unimportant.

I find it highly unlikely that a Board agent would fail to recognize the significance of such an exchange. It is equally unlikely that Nalepa would sign an affidavit which concluded with the statement that the Respondent had made no other remarks pertaining to the Union, if the Tucker incident occurred as he alleged. Headen did little to enhance Nalepa's credibility – he conceded that he and the Charging Party had "a pretty good rapport," and that Respondent had compelled him to resign after discovering he had engaged in misconduct. In light of these circumstances, I conclude that Nalepa concocted this story, and related it to the General Counsel's benefit shortly before the instant trial in order to enhance his case.[5]

5. Nalepa's Termination

The General Counsel's Case

On June 20, Nalepa informed the Security Director, Harold Scott, that he had been offered a desirable full time position with the State of Michigan, and asked to transfer to a part-time assignment with Fairlane. According to Nalepa, Scott told him he saw no problem with this. However, he asked Nalepa to put his request into writing since he would have to discuss the matter with his superiors, Fenley and Jemison.

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[5] This incident formed the basis of General Counsel's Motion to amend the complaint at the outset of the hearing.

Later that day, Nalepa submitted a memo seeking part-time employment as of July 4. When Nalepa repeated his request several days later, Scott purportedly assured him there would be no problem and that he probably would work Fridays through Sundays.

Nalepa further stated that when the next assignment schedule dated June 26 was posted, he noted that his assignments ceased on July 3. On learning that Security Director Scott was responsible for the scheduling, he made an appointment to discuss the matter with him on June 28.

On the appointed day, Nalepa met with both Scott and Fenley, with the latter doing all of the talking. Fenley advised Nalepa that he had considered the situation with other members of management who were concerned that if contract negotiations with the union were required, they might impact part-time work. Accordingly, they concluded that it would be in the Respondent's best interests to refrain from changing any employees' status, other than filling the vacancy which would be created by his departure.

Fenley concluded the meeting by telling Nalepa that his acceptance of a new full-time position would be regarded as a resignation which would take effect immediately. He then offered him a pay check which included accrued vacation and severance pay. However, Nalepa insisted he was not resigning and refused to accept the check.

Several months later, Cleary contacted Nalepa to arrange a meeting. When they met on October 7, Cleary tried to assure Nalepa that his union activity had nothing

to do with the denial of part-time employment and offered him a full-time position. Nalepa rejected the offer, but testified that Cleary also promised that he would fight for his return to a part-time job, Cleary denied making such a pledge.[6]

Respondent's Version

Scott denied assuring Nalepa that he had no problem with his transferring to part-time work. Instead, he alleged telling Nalepa that the transfer might pose a scheduling problem and promised to give him an answer subsequently. Scott further explained at trial that he was opposed to retaining an employee on a part time basis who was leaving for a full-time position elsewhere, since the individual's primary commitment would be to the full-time post. This, he claimed, would lead to scheduling problems and a greater incidence of overtime which drew higher hourly wage rates.

Scott related that after receiving Nalepa's written request, he told General Manager Fenley that he was opposed to granting part-time status to Nalepa. Fenley agreed with him, but suggested that in light of the union's May 16 election petition, they should seek legal advice from Cleary, a lawyer and Respondent's Vice-President for employee relations. A few days later, the three men spoke with by telephone. Cleary endorsed

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[6] Respondent contends that Cleary offered Nalepa a full-time position during a telephone conversation in late September, while Nalepa maintains that the offer came during a meeting with Cleary on October 7, the day of the election.

Scott's view that part-time employees with full-time positions elsewhere harbored divided loyalties, but left the final decision in the Security Chief's hands.

In describing his final interview with the Charging Party, Fenley stated that he first confirmed that Nalepa had accepted a full-time position with the State's Department of Public Health, and then asked him if he could work full-time at Fairlane. When Nalepa replied that he could not manage two full-time jobs, Fenley told him that because Respondent was seeking commitment from its employees, his request for part-time employment could not be honored and his acceptance of employment elsewhere would be regarded as a resignation.

At no point in his account, did Fenley state that he had referred to the union during the meeting with Nalepa. Scott, on the other hand, confirmed Nalepa's testimony that Fenley did allude to the effect that union negotiations might have on scheduling part-time employees.

III. DISCUSSION AND CONCLUDING FINDINGS

A. Principles Governing General Counsel's Burden of Proof

In *Wright Line*, 251 NLRB 1083, 1089 (1980),[7] the Board announced a causation test for alleged Sec. 8(a)(3) violations. Under this test, the General Counsel bears the initial burden of making a *prima facie* showing sufficient

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[7] *enfd.* 682 F.2d 899 (1st Cir. 1981); *cert. denied*, 455 U.S. 989 (1980).

to support the inference that protected activity was a "motivating factor" in the employer's decision.[8] To establish a *prima facie* case, the government must adduce proof of the following elements: that the employee engaged in protected activity,[9] that the employer knew of this activity,[10] and acted adversely to the employee out of anti-union animus.[11] In other words, proof of these elements must support the inference that the employee's protected conduct was a motivating factor in the employer's decision to adversely alter his or her terms of employment. On applying these standards to the evidence in this case, I conclude that the General Counsel has met his burden.

Nalepa clearly was engaged in union activity; indeed, he was the sole activist on Respondent's staff. He alone was responsible for initially contacting the union

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[8] *Id.* at 1089; *Local 357, Int'l Brotherhood of Teamsters, Chauffeurs & Warehousemen v. NLRB*, 365 U.S. 667, 675 (1961) ("It is the 'true purpose' or 'real motive' in hiring or firing that constitutes the test.").

[9] *Wright Line*, 251 NLRB at 1089; *see F&E Erection Co.*, 292 NLRB 587, 592 (1989) (finding that GC proved its *prima facie* case including existence of protected activity).

[10] *See Goldtex, Inc. v. NLRB*, 14 F.3d 1008, 1011 (4th Cir. 1994) (quoting *Mack's Supermarkets, Inc., 288 NLRB 1082, 1101 (1988)*) ("[C]ompany knowledge of union activities is the 'threshold question' . . . because it is a 'fundamental prerequisite' in establishing a discriminatory motivation); *Active Transp.*, 296 NLRB 431, 432 (1989) (discussing key elements of *prima facie* case), *enfd.* 924 F.2d 1057 (6th Cir. 1991).

[11] *See NLRB v. DBM, Inc.*, 987 F.2d 540, 543 (8th Cir. 1991) (enforcing Board order because proof of union animus was sufficiently established).

and taking the steps which led ultimately to the conduct of an election.

Based on Sergeant Vallely's convincing testimony that Nalepa's union activism was a matter of common knowledge, I have not the slightest doubt that Respondent's officials knew that Nalepa was responsible for the union organizing campaign.

Moreover, Nalepa gave himself away as a union proponent on several occasions in the presence of supervisors. Tucker acknowledged knowing only that Nalepa was "pro-union." Given that admission, it is impossible to believe that he did not know what actions Nalepa took to warrant the pro-union label.

Since knowledge of Nalepa's union leanings was widespread, I find Scott's and Fenley's claims that they were unaware of his activities on POAM's behalf incredible.[12] Scott, the chief of the security force, was professionally trained to uncover the identify of persons responsible for various misdeeds at the shopping center. If he was oblivious to the presence of a union proponent on his staff, one wonders how incisive he was in performing his

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[12] Respondent's Vice President, Healy, also denied knowing of Nalepa's dominant role in the Union campaign. Since he did not have the same frequent contact with the members of the Security Force as did Scott and Fenley, I cannot conclude with conviction that he, too, knewof [sic] Nalepa's union activity. However, I find it curious that an executive with responsibility for employee relations in a substantial enterprise would fail to determine the identity of the key union organizer. It also is interesting to note that Nalepa's assertion that Healy greeted him on October 7 with a wry comment about the Union election was not contradicted.

other investigatory duties. The stout denials by these officials that they knew of Nalepa's union activity, which are contrary to the credited evidence, raises serious doubts as to their credibility on other matters as well.[13]

Respondent's decision to invoke a new, unwritten and unannounced policy and apply it for the first time to the sole Union protagonist soon after an election petition was filed, cannot be attributed to sheer coincidence. The summary manner in which Nalepa was removed from the scene also gives rise to doubts as to the legitimacy of his discharge. Nalepa had asked to be transferred to part-time status as of July 4. Yet, without explanation, Respondent abruptly ended his employment on June 28, when Fenley handed him a paycheck with his accrued vacation and severance pay already factored into it. Respondent gave no reason for this haste in removing Nalepa from the scene, suggesting that the real reason was one which management preferred to conceal.

Based on the foregoing factors, I found that the General Counsel had established a *prima facie* case that Nalepa was terminated for unlawful reasons. Accordingly, under *Wright Line, supra,* the burden shifted to Respondent to prove that its reasons for rejecting Nalepa's request for part-time employment were legitimate; that it would have acted in the identical manner even in the absence of the Charging Party's union activity. To this end, Respondent's claimed that they insisted

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[13] I also found that Nalepa fabricated a portion of his testimony. However, in finding that he was subject to discrimination, I did not rely on the parts of his testimony which were in dispute.

on Nalepa's resignation on finding that scheduling difficulties arose when employees converted to part-time employment in order to accept full-time positions elsewhere.[14] For a number of reasons discussed below, I find Respondent's alleged business justification unconvincing.

Respondent's Chief of Security, Scott, took the lead in making the case for his employer. He claimed that he never had approved of the practice of permitting an employee to convert to part-time status on accepting a full-time position with another employer, since this meant that the employee's primary loyalties would no longer be with Fairlane. He further claimed that such a shift in loyalties led to scheduling difficulties, and excessive overtime which was costly to the Employer. However, at the time that Scott first was hired as Security Chief in November 1994, he was well aware that Respondent maintained a retinue of part-time employees for years. Yet, he chose to do nothing about this situation in word or deed, either prior to or following Nalepa's termination. If part-time workers with full-time positions elsewhere posed a problem for the efficiency of Respondent's operations, as it claimed, then one wonders why Scott took no other steps to discourage the continued employment of part-time workers who presumably worked full-time for other employers. The Company did not announce a change of policy in this area either orally or in writing. Except for Nalepa, none of the other part-time employees already on the staff was dismissed or given

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[14] None of Respondent's witness ever explained the precise nature of the scheduling difficulties which allegedly were caused by part-time guards.

notice that Respondent had any problem with their part-time status.

Although Scott testified without dispute that he rejected three apparently well-qualified candidates for part-time positions because they held full-time jobs elsewhere, he retained all previously hired part-timers who were employed full-time by other employers. Moreover, since Nalepa's discharge, Scott has hired six new part-time guards, some as recently as two weeks before the instant proceeding. Scott asserted that none of the newly-hired part-time employees held other full-time positions. However, there is no guarantee that persons working on a part-time basis who hold no other job, will not harbor other loyalties or cause scheduling difficulties. Indeed, Sergeant Vallely testified that Respondent "always" had scheduling problems, in part because of the nature of police work which invariably involves fortuitous circumstances such as court appearances. I understood the Sergeant to mean that both full-time and part-time employees were responsible for scheduling problems and that such problems were not resolved following Nalepa's departure. Additionally, Scott acknowledged that Respondent maintains a rotation list of part- and full-time employees; if an officer is occasionally unavailable, the next person on the list is called. Respondent made no attempt to claim that the rotation lists were no longer in use.

Further, Vallely pointed out that Scott made great efforts to trim the amount of overtime hours worked. However, only full-time security guards were entitled to overtime pay; part-time employees were paid straight-

time wages. Consequently, to reduce overtime, Respondent's economic advantage to maintain a cadre of part-time guards. Therefore, if Scott was intent on reducing overtime hours, he would have to rely on part-time employees. It is ironic that part-time guards were most needed on evening and weekend shifts, the very times that Nalepa was available.

The situation of one of Respondent's security guards, Scott Kulinski, reflects Respondent's lack of concern with part-time employees who held full-time positions elsewhere. Kulinski was recruited for a position with Respondent in December 1993, and worked 14 to 30 hours a week. At the same time, he maintained a stressful, full-time sales position at a uniform supply store where typically, he put in a 43 hour week. Contrary to Respondent's alleged notion of efficient employment practices, Kulinski remained on Fairlane's payroll as a part-time guard at the time of the instant proceeding.

Another security guard, Todd Seipenko, transferred from full to part-time status in September 1993 to accept a position with a community police force. Finding it too demanding to continue working both jobs, Seipenko voluntarily quit his job with Respondent in August, 1994. Respondent's managers knew about the demands on Seipenko's time. They also were aware that he had rejected some of the part-time work opportunities offered to him. He hardly fit Scott's need for employees who were "flexible and were committed to Fairlane Town Center." (TR. 256) Nevertheless, Respondent made no effort to alter his employment.

Nalepa had never posed an attendance problem for Respondent. He was experienced, lived near the Shopping Center and was available on the very occasions when Scott said that that Respondent most needed part-timers. In light of all of the above circumstances, I conclude that Respondent simply took advantage of the opportunity that Nalepa presented. Not until management was presented with this opportunity to rid itself of the sole union organizer on the security guard staff did Respondent create the defense presented in this case and suddenly raise its alleged concerns about loyalty and scheduling conflicts. Based on of the foregoing considerations, I conclude that Respondent has failed to establish that it would have terminated Nalepa were it not for his critical role in the Union's organizing campaign. Had he not engaged in that activity, it is more likely than not that he still would be working as a part-time security guard for Fairlane.

IV. CONCLUSIONS OF LAW

1. The Respondent is an employer engaged in commerce within the meaning of Sec. 2(2), (6) and (7), and the Union is a labor organization within the meaning of Sec. 2(5) of the Act.

3. By refusing to honor Scott Nalepa's request to convert him from full-time to part-time employment, and treating his refusal to continue working full-time as a voluntary quit, Respondent violated See. 8(a)(1) and (3) of the Act.

4. The above unfair labor practices affect commerce within the meaning of Sec. 2(2), (6) and (7) of the Act.

V. THE REMEDY

Having found that Respondent violated Sec. 8(a)(1) and (3) of the Act by refusing to retain Scott Nalepa as a part-time security guard, I shall recommend that the Company cease and desist from engaging in discriminatory practices and take appropriate action designed to effectuate the purposes of the Act.

Specifically, I shall recommend that Respondent be required to offer immediate employment to Nalepa as a part-time security guard and make him whole for any earnings lost by reason of the discriminatory action taken against him.

Backpay due under the terms of this Order shall be computed on a quarterly basis as prescribed in *F.W. Woolworth Co.*, 90 NLRB 289 (1950), and shall be reduced by net interim earnings with interest computed as detailed in *New Horizons For the Retarded*, 283 NLRB 1173 (1987).

On these findings of fact and conclusions of law and on the entire record, I issue the following recommended[15]

VI. ORDER

The Respondent, NSBD d/b/a Fairlane Town Center, Dearborn, Michigan, its officers, agents, successors and assigns, shall

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[15] If no exceptions are filed as provided by Sec. 102.46 of the Board's Rules and Regulations, the findings, conclusions and recommended Order shall be adoopted [sic] by the Board as provided in Sec. 102.48 of the Rules, and all objections to them shall be deemed waived for all purposes.

1. Cease and desist from:

a. Refusing to grant employees' requests for part-time employment, and discharging them because they have engaged in union activities.

b. In any like or related manner, interfering with, retraining or coercing employees in the exercise of their rights protected by the act.

2. Take the following affirmative action necessary to effectuate the policies of the Act:

a. Offer Scott Nalepa full and immediate reinstatement to the part-time position for which he applied and would have been employed but for Respondent's unlawful discrimination against him, without prejudice to any seniority or other rights and privileges he would have acquired, and make him whole, with interest, where appropriate, for any loss or earnings and/or benefits suffered as a result of that discrimination, in accordance with the remedial section of this Decision.

b. Preserve and, on request, make available to the Board or its agents for examination and copying, all payroll records, social security payment records, timecards, personnel records and reports and all other records necessary to analyze the amount of backpay due under the terms of this Order.

c. Post at its office and at all worksites, copies of the attached notice marked Appendix.[16] Copies of the notice,

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[16] If this Order is enforced by a Judgment of the U.S. Court of Appeals, the words in the notice, "Posted By Order of the

on forms provided by the Regional Director for Region 7, after being signed by Respondent's authorized representative, shall be posted by the Respondent immediately upon receipt and maintained for 60 consecutive days in conspicuous places where notices to employees customarily are posted. Reasonable steps shall be taken y [sic] the Respondent to ensure that the notice (or notices) are not altered, defaced or covered by any other material.

d. Notify the Regional Director in writing within 21 days from the date of this Order what steps Respondent has taken to comply.

Dated: Washington, D.C.
January 23, 1996

/s/ Arline Pacht
Arline Pacht
Administrative Law Judge

National Labor Relations Board" shall read "Posted Pursuant to a Judgment of the U.S. Court of Appeals Enforcing an Order of the National Labor Relations Board."

APPENDIX C

NOTICE: This opinion is subject to formal revision before publication in the Board volumes of NLRB decisions. Readers are requested to notify the Executive Secretary, National Labor Relations Board, Washington, D.C. 20570, of any typographical or other formal errors so that corrections can be included in the bound volumes.

NSBD d/b/a Fairlane Town Center *and* Scott A. Nalepa. Case 7-CA-36687

April 30, 1996

DECISION AND ORDER

BY CHAIRMAN GOULD AND MEMBERS COHEN AND FOX

On January 23, 1996, Administrative Law Judge Arline Pacht issued the attached decision.* The Respondent filed exceptions and a supporting brief, and the General Counsel filed an answering brief.

The National Labor Relations Board has delegated its authority in this proceeding to a three-member panel.

The Board has considered the decision and the record in light of the exceptions and briefs and has decided to affirm the judge's rulings, findings,[1] and conclusions, and to adopt the recommended Order as modified.[2]

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* We hereby correct the judge's erroneous substitution of the name "Healy" for "Cleary" in fn. 12 of her decision, and her statement, at sec. III.A. par. 8, that Security Chief Scott was hired in "1994" instead of "1993."

[1] The Respondent has excepted to some of the judge's credibility findings. The Board's established policy is not to overrule an administrative law judge's credibility resolutions unless the clear preponderance of all the relevant evidence

ORDER

The National Labor Relations Board orders that the Respondent, NSBD d/b/a Fairlane Town Center, Dearborn, Michigan, its officers, agents, successors, and assigns, shall take the action set forth in the Order as modified.

Insert the following as paragraph 2(b) of the Order, relettering the remaining paragraphs accordingly.

"(b) Remove from its files all reference to the unlawful refusal to grant Scott Nalepa's request to transfer to part-time employment as a security guard, and notify him that this action has been taken and will not be used against him in the future."

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convinces us that they are incorrect. *Standard Dry Wall Products*, 91 NLRB 544 (1950), enfd. 188 F.2d 362 (3d Cir. 1951). We have carefully examined the record and find no basis for reversing the findings.

The Respondent's exceptions assert that the judge's decision evidences bias and prejudice. On our full consideration of the entire record in this proceeding, we find no evidence that the judge prejudged the case, made prejudicial rulings, or demonstrated bias against the Respondent in her analysis and discussion of the evidence.

In adopting the judge's attribution of knowledge of Nalepa's union sympathies to Security Chief Scott, we do not rely on her comments pertaining to Scott's investigatory competence.

[2] We shall modify the Order by inserting the expunction language that the judge has included in the notice but has inadvertently omitted from the recommended Order.

Dated, Washington, D.C. April 30, 1996

William B. Gould IV, Chairman

Charles I. Cohen, Member

Sarah M. Fox, Member

(SEAL) NATIONAL LABOR RELATIONS BOARD

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321 NLRB No. 22

NSBD d/b/a Fairlane Town Center *and* Scott A. Nalepa. Case 7-CA-36697

CORRECTION

On April 30, 1996, the National Labor Relations Board issued its Decision and Order in the above-entitled proceeding in which an inadvertent error appears in the asterisk footnote, which should refer to footnote 11 instead of footnote 12. Substitute the attached page 1 for the one previously issued.

Dated, Washington, D.C. May 7, 1996

APPENDIX D

Case No. 97-3179

J-4993-A
UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

ORDER

NATIONAL LABOR
RELATIONS BOARD

Petitioner

(Filed Jun. 9, 1998)

v.

NSBD, doing business as
Fairlane Town Center

Respondent

BEFORE: SUHRHEINRICH, DAUGHTREY and COLE, Circuit Judges.

Upon consideration of the petition for rehearing filed by the Respondent,

It is **ORDERED** that the petition for rehearing be, and it hereby is, **DENIED**.

ENTERED BY ORDER OF THE COURT

/s/ Leonard Green, JMB
Leonard Green, Clerk